No. ~~1245~~ 93

IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, FIREMAN'S FUND INSURANCE COMPANY, a corporation, CHAS. R. McCORMICK LUMBER COMPANY OF DELAWARE, a corporation, and McCORMICK STEAMSHIP COMPANY, a corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This is a proceeding to review a compensation order made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. C.A., Secs. 901 et seq.

The respondent filed this action in the District Court of the United States for the District of Oregon, seeking a mandatory injunction directed to the Petitioner, Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, requiring him to set aside his Orders of July 29th, 1937 (R. 19) and February 15th, 1940 (R. 25), rejecting respondent's claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. The said Deputy Commissioner had rejected the claim of respondent for compensation under said Act upon the grounds: "(1) That the said claim was not filed within one year after the injury, and (2) That the claimant (respondent) has not been overreached by the employer or insurance carrier" (R. 35).

The respondent filed his complaint in the District Court on the 13th day of August, 1937 (R. 2). The District Judge was not satisfied with the findings of the Deputy Commissioner in his Order of July 29th, 1937, and, therefore, entered an order referring the cause back to the Deputy Commissioner so that he might make specific findings, covering each issue made by the parties and also authorizing the parties to offer further evidence before the Deputy Commissioner in support of their respective positions (R. 20, 21). Several hearings were thereafter held before the Deputy Commissioner in connection with respondent's claim (R. 105, 147, 181).

It was the contention of the respondent at the original hearing before the Deputy Commissioner on July 23, 1937 (R. 210-270) and also at the various subsequent hearings before said Deputy Commissioner, that, although the respondent had failed to file his claim for compensation with the Deputy Commissioner within the one year period after his injury, as required by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)), yet the petitioning employer and the petitioning insurance carrier had waived the filing of the compensation claim by respondent within one year after his injury, and that the said petitioners by their actions were estopped from asserting that respondent had failed to file his claim for compensation within the time required by said Compensation Act.

On February 15th, 1940, the said Deputy Commissioner made and filed a subsequent Order rejecting the claim of respondent for compensation for the reasons above set forth. The Deputy Commissioner did order that the employer and insurance carrier should furnish the respondent with certain medical services. (R. 30-35)

After the making of said subsequent Order rejecting his compensation claim, the respondent, on the 19th day of February, 1940, filed in the said Federal District Court a supplemental complaint, wherein he sets forth his objections to the findings and conclusions of the Deputy Commissioner in his

said Order of February 15th, 1940 (R. 22-26).

It is the contention of the respondent in his supplemental complaint, as it is in his original complaint, that the action of the claim's attorney representing the petitioning insurance carrier was such as to estop the said carrier and the petitioning employer from claiming that respondent's claim for compensation was not filed within the time required by the said Longshoremen's Act (R. 25). It is further urged in said supplemental complaint that respondent's mentality was affected so that he did not appreciate the significance of his acts and was rendered incompetent to transact any important business (R. 23).

The petitioners filed Motions to Dismiss respondent's suit upon the ground that it appears from the face of the complaint, supplemental complaint and from the proceedings had before the Deputy Commissioner that respondent is not entitled to the relief demanded by reason of the fact that the evidence produced before the Deputy Commissioner at the various hearings held before him were sufficient to sustain the Orders of said Deputy Commissioner rejecting respondent's compensation claim.

The District Judge reached a conclusion contrary to that of the said Deputy Commissioner and found that the petitioning insurance carrier is estopped to assert that respondent's compensation claim was not timely filed and that said insurance

carrier waived the provisions of Section 13(a) of the Longshoremen's Act (33 U.S.C.A., Sec 913 (a)), requiring that a claim be filed within one year after the injury (R. 58). The said District Judge also made and entered a decree directing the said Deputy Commissioner to set aside the said Orders made by him on July 29th, 1937, and February 14th (15th), 1940, rejecting respondent's compensation claim filed by him with the Deputy Commissioner on April 10th, 1937, was a valid claim for compensation "and that the defendants (petitioners) * * are estopped from asserting contrariwise" (R. 61). Petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the said decree of the District Court (R. 78). The said Circuit Court of Appeals affirmed the decree of the District Court (R. 290). There was a dissenting opinion, however, by Circuit Judge Haney (R. 288).

The evidence in this case discloses that the respondent, Pletz, is a longshoreman and maritime worker. On November 12th, 1935, he was employed by the petitioner McCormick Steamship Company in loading some oil containers or vegetable drums on the steamship "West Planter." He was standing under the hatch combing on said ship when some of the drums or containers being loaded on the ship fell and one hit him in the back of the hip (R. 211, 212). He did not hurt his head in any way. Just got hurt on the back. He always had possession of his faculties so that he knew what he was doing and the business he was transacting.

(R. 214). Pletz was sent to the hospital by the McCormick Steamship Company (R. 212).

The law firm of Raffety and Pickett were the attorneys handling the claim of Pletz for the McCormick Steamship Company. They were not the general attorneys in Portland, Oregon, for said company (R. 186, 187). The petitioner Fireman's Fund Insurance Company was the insurance carrier for the McCormick Steamship Company under the said Longshoremen's and Harbor Workers' Compensation Act. When Pletz was injured, the matter of his claim was referred to Mr. Pickett by the said insurance company (R. 148, 269).

Several days after Pletz was injured, Mr. Wendell Gray, who was employed by Raffety and Pickett to investigate cases coming under the said Longshoremen's Act (R. 229), called upon Pletz at the hospital and secured a statement from him. The statement was signed November 15th, 1935 (R. 204, 205, 217, 230). Gray secured the statement in order that a report could be made to the Accident Commission (R. 217). The taking of this statement was merely a routine matter (R. 164).

On November 26th, 1935, Gray went back to the hospital and offered Pletz a compensation check (R. 162, 205, 206). The check was for $14.22 (R. 161). This check was tendered the exact date it was due under the Longshoremen's Act (R. 162). Pletz refused the check tendered him by Gray, saying that he did not need the money, but that when

he got out of the hospital he would see Raffety and Pickett (R. 149, 218).

Pletz was in the hospital the first time until about Christmas, 1935 (R. 150, 212). He saw Pickett at the latter's office about three weeks after he got out of the hospital (R. 213). It was sometime between December 24th, 1935, and February 12th, 1936 (R. 161). Mr. Pickett offered to pay him compensation at this time. Pletz refused the offer (R. 219). Pickett offered Pletz $14.75 a week, based upon a report he had relative to Pletz's earnings. Pletz claimed that the offer was not high enough (R. 150). In this connection, Mr. Pickett testified (R. 150):

> "* * I told him (Pletz) that I was bound by the report from the bookkeeping department of the Employers but if he could bring in any other earnings we would check them, or he could go down to the waterfront and check them himself, but at any rate, if he was entitled to a higher rate, the acceptance of the amount I offered him would not prejudice his rights, but when it was finally found out what he was entitled to as a rate of compensation, that would be made up to him."

Mr. Pickett urged Pletz to see Mr. Marshall, the Deputy Commissioner relative to the amount of his compensation, and urged Pletz to take compensation (R. 174). Pletz always refused the compensation (R. 192). Pickett went so far as to endeavor to find out what compensation Pletz thought he was entitled to, and asked him if he would take $18, $20 or $25 a week. Pletz was not satisfied. All

he had in mind was some sort of a liability settlement (R. 193). Pletz admits that he refused the compensation payments offered by Pickett (R. 139, 141, 142, 157, 221, 226). Pletz never made any attempt to secure information relative to his prior earnings, in order to show Mr. Pickett that the amount of compensation offered by him was less than the amount he was entitled to under the Longshoremen's Act.

Pletz consulted with his attorney, Mr. Green, relative to his compensation (R. 139, 225). Mr. Green told Pletz that he had a good case in which to try to break the Longshoremen's Act (R. 227). Pletz told Green to have the papers ready (R. 228). Pletz called upon Mr. Marshall, the Deputy Commissioner, before the year expired after his injury (R. 135), and admitted he had an attorney (R. 135-137). He told the Deputy Commissioner he was not satisfied with the rate of compensation offered him by Mr. Pickett. Mr. Marshall told Pletz if his earnings were higher he could secure a readjustment later (R. 136).

Mr. Marshall, the Deputy Commissioner, also made the following statement at one of the hearings before him (R. 144, 145):

> "THE COMMISSIONER: Well, the statement that I will make is simply this: That he (Pletz) came to me while I was holding hearings in Portland and said that he, he mentioned the name of Green, Tanner & Boesen, and said that he was not satisfied with the rate of com-

pensation that had been offered him, and I explained to him that that question could be straightened out by referring to the payroll records, and they were open and accessible to him, and in that conversation he also stated that the attorney that he referred to, whom he had consulted, had said something about he could break the Act. I don't know whether Mr. Pletz used the word 'unconstitutional,' but that was the tenor of his explanation to me, and that was all that was said at the time of that conversation.

Mr. Beckett: What date was that?

The Commissioner: Oh, I don't know the date but it was some months after the injury, it was sometime after the injury, but I can't positively say the exact date, because I don't know.

Mr. Beckett: It was some months after the injury?

The Commissioner: Yes, it was some months after the injury.

Mr. Beckett: You are not of the impression that it was over a year after?

The Commissioner: No, I don't think it was. He is of the impression it was."

Pletz admitted he had talked to lawyers (R. 138), and that he had seen Marshall prior to August or September, 1936 (R. 153, 154). He at another time claimed that it was after the expiration of the first year following his accident that he saw Marshall (R. 145). Mr. Pickett recalled that he had seen Pletz in the law office of Green, Tanner & Boesen sometime prior to September, 1936 (R. 155, 156, 172). Mr. Pickett also informed Pletz that if he was in doubt as to his rights to see a lawyer (R. 175).

Pletz's conversations with Pickett (R. 189) "could be summed up in that he wanted a settlement, and I had better get a settlement if I wanted to save myself trouble. Now there was a kind of covert threat there, I don't mean personally against me, as though the results would be disastrous to us if we didn't settle with him."

Pletz also talked with his present lawyer, Mr. Lord, "At the hospital and several times on the street and once going to the Court House" about his case before the year passed following his accident (R. 201).

Pletz returned to the hospital a second time for an operation on February 12th, 1936, and was out again on March 13th, 1936 (R. 151, 152, 213). When Pletz got out of the hospital the second time he began to talk about a lump sum settlement (R. 152). It was not a case where Pickett could ordinarily make a lump sum settlement. Pickett talked about it some, but urged Pletz to take compensation (R. 152). At this time a thorough check had been made of Pletz's earnings and it was determined he was entitled to $14.99 (R. 152).

During 1936 Pletz was in Pickett's office a dozen times—quite often (R. 132, 161, 222). Some times he would go to Pickett's office every week and some times he would delay quite a while between visits (R. 173). According to Pletz, Pickett was going to give him a lump sum settlement, but they could not come to any agreement because Pickett did not

think Pletz was in need of further medical care (R. 132, 140, 220-222).

Mr. Pickett talked lump sum settlement with Pletz because he made Pickett discuss it (R. 158). Pickett informed Pletz that a lump sum settlement could only be made in two instances. One was if there was a third party claim, and the other was under the Compensation Act where he had reached the point where he was not disabled and was able to return to work (R. 159). Pickett and Pletz had many discussions and Pickett could not make Pletz understand that he was sincere in his position that he could not make a lump sum settlement under the condition that existed (R. 160).

In this connection, Mr. Pickett further testified (R. 170):

> "Back in August or September, 1936, in my discussion with Mr. Pletz regarding a lump sum settlement, and the payment of compensation, he made it very clear to me that he was not going to take compensation. From that time on I wasn't very clear in my own mind what my relation to Mr. Pletz was. As soon as it became apparent that he was going to urge a lump sum settlement, either as the result of a direct suit against the employer, or as a third party claim—I notified the attending physician that I didn't know whether we would be liable under the act, or whether the payment would have to come out of whatever adjustment would result from his demand for a lump sum settlement. For instance, if he would sue a third party, we usually have an understanding with the attending physician that our liability under the act is not to be followed out, and that the

collection will be—as the result of the lump sum settlement."

Mr. Pickett did not know how to stop Pletz from talking a lump sum settlement (R. 176). He could not keep Pletz from talking about it (R. 177). Pickett explained to Pletz why a lump sum settlement could not be made (R. 178).

Mr. Pickett also testified (R. 157):

"Q. And inasfar as you know or inasfar as any of your dealings with Mr. Pletz were concerned, was he in any way misled or misinformed or played along, as you might call it, with the idea of having him lose or waive any of his rights?

A. No. He gave me to understand thoroughly that he had seen a lawyer. In fact, his conversation regarding the case led me to think he must have seen a lawyer, and it never entered my mind but that they had their plans, whatever it was, and that—well, I just never thought about his becoming delinquent in it, the thought never occurred to me."

JURISDICTION

The decree was made and entered in the United States District Court for the District of Oregon on April 15, 1941 (R. 60, 61). The appeal to the United States Circuit Court of Appeals for the Ninth Circuit was perfected July 8th, 1941 (R. 78-82). The appeal was heard before three circuit judges (R. 277). Two of the judges concurred in rendering an opinion affirming the decree of the District Court (R. 278-287). On motion of petitioners herein the United States Circuit Court of Appeals for the

Ninth Circuit, on the 10th day of April, 1942, stayed the issuance of Mandate pending the determination of this petition for writ of certiorari by the Supreme Court of the United States (R. 291).

The jurisdiction of this Court is invoked under Section 240(a) of the Act of February 13, 1925, Title 28, Section 347, U.S.C.A.

QUESTIONS PRESENTED

1. Whether the provisions of Section 13(a) of the Longshoremen's and Harbor Worker's Compensation Act (33 U.S.C.A., Sec. 913(a)), requiring that claims for compensation for disability be filed within one year after the injury is mandatory and the compliance therewith jurisdictional.

2. Whether pleas of waiver or estoppel are available where a claim for compensation is not filed with the Deputy Commissioner within the time provided for by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)).

3. Whether an employer loses his right to disclaim liability to pay compensation to an injured employee where the said employee fails to file his claim for compensation with the Deputy Commissioner within one year after his injury and the employer and its insurance carrier are ready and willing to pay compensation to the said employee during said year, but said employee refuses to ac-

cept same, and where no controversial is filed by the employer or his insurance carrier during said year period, although the employer and the insurance carrier thought the workman was able to return to work prior to the expiration of the year period.

4. Whether, for the purpose of the limitation provided for in Section 13(a) of the Longshoremen's and Harbor Workers' Act (33 U.S.C.A., Sec. 913(a)), an offer of compensation by an employer or its insurance carrier to an injured workman which is rejected by him, is the equivalent of payment of such compensation, and whether the said time limit does not commence to run until the continuing offer is withdrawn or the right to further payment is controverted.

(It was unnecessary for us to have objected to the numerous findings of the District Judge in this case. In cases of this character the sole question is whether the record discloses competent evidence to support the findings of the deputy Commissioner. The District Judge is not authorized to re-try the case. Employers' Liability Assur. Corp. v. Hoage (App. D.C.) 91 F. (2d) 318; South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251, 257, 258, 60 S. Ct. 544, 548, 84 L. Ed. 732, 736. Upon a Motion to Dismiss, the facts are admitted and no findings are necessary. Thomas v. Peyser (App. D.C.) 118 F. (2d) 369, 374.)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The construction of the Circuit Court of Appeals for the Ninth Circuit that, where an employer or its insurance carrier offers to pay an injured employee compensation under the Longshoremen's and Harbor Workers' Compensation Act, which he declines to accept, the time limit prescribed by Section 13(a) of said Act (33 U.S.C.A., Sec. 913(a)) for the filing of claims by injured employees does not commence to run until the continuing offer of compensation by the employer or its insurance carrier is withdrawn or a controversial filed with the Deputy Commissioner is in conflict with the decision of the Court of Appeals for the District of Columbia on the same matter in the case of Fulton v. Hoage, 77 F. (2d) 110, 112.

2. The construction of Section 13(a) of the Longshoremen's and Harbor Workers' Act (33 U.S.C.A., Sec. 913(a)) by the Circuit Court of Appeals to the effect that for the purpose of the limitation therein provided tender of compensation is the equivalent of payment is the decision of a federal question in a way probably in conflict with applicable decisions of this Court. Bronson v. Rodes, 74 U. S. 229, 250; 19 L. Ed. 141, 146.

3. The Circuit Court of Appeals for the Ninth Circuit in deciding that the claim of the respondent for compensation was not barred by the limitation

provided for in Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)) is the decision of a federal question in a way probably in conflict with applicable decisions of this Court. Kobilkin v. Pillsbury, 309 U. S. 619; 84 L. Ed. 983; 60 S. Ct. 465; William Danzer & Co. v. Gulf R. Co., 268 U. S. 633, 636, 69 L. Ed. 1126, 1129, 45 St. Ct. 612, 613.

4. The Judges of the Circuit Court of Appeals for the Ninth Circuit were divided upon the questions of law involved in the case at bar, and therefore the questions involved should be passed upon by this Court.

5. The question whether the claim of the respondent was barred under the facts in this case is of such paramount importance to all employers and employees governed by the Longshoremen's and Harbor Workers' Compensation Act as to call for an exercise of this Court's power of supervision over this cause.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9896, Wm. A. Marshall, Deputy Commis-

sioner, 14th Compensation District, U. S. Employees Compensation Commission, Fireman's Fund Insurance Company, a corporation, Chas. R. McCormick Lumber Company of Delaware, a corporation, and McCormick Steamship Company, a corporation, Appellants, v. G. Pletz, Appellee, and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners,

vs.

G. PLETZ, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF COURTS BELOW

The opinion of the United States District Court for District of Oregon in this case has not been reported. It appears in the record at pages 37-40. The opinion in the Circuit Court of Appeals for the Ninth Circuit does not appear to be as yet officially reported. It is dated March 21, 1942, and appears on pages 278-289 of the record herein.

II.

JURISDICTION

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit is March 21, 1942 (R. 290).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Act of February 13, 1925, Title 28, Sec. 347, U.S.C.A.

The 38th Rule, paragraph 5, of the Revised Rules of this Court provides that where there are special and important reasons therefor a writ of certiorari will be granted by this Honorable Court. The matters hereinafter set forth disclose the basis and grounds on which it is contended that this Court has jurisdiction to review the decree of the court below and the grounds on which the jurisdiction of this Honorable Court is invoked, and it is deferentially submitted that said grounds bring the petition herein within the aforementioned Rule.

III.

STATEMENT OF THE CASE

This has already been set forth in the preceding petition at pages 1-12 thereof, which statement is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that under the facts of this case it was incumbent upon respondent's employer or its insurance carrier to have filed a controversial prior to the filing of a formal claim for compensation by respondent.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the time limit prescribed by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. A., Sec. 913(a)) for the filing of claims does not apply to cases where compensation is offered to an employee and refused by him, and that such time limit does not commence to run until the continuing offer is withdrawn or the right to further payment controverted.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that respondent's claim for compensation was not barred by virtue of the express provisions of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)).

V.

SUMMARY OF ARGUMENT

Point 1. The limitation prescribed in Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)) for the filing of compensation claims is mandatory and compliance therewith is jurisdictional.

Point II. If the claim of a workman for compensation is not filed within the period provided for by the Longshoremen's and Harbor Workers' Compensation Act it is lost, and pleas of waiver and estoppel are of no avail.

Point III. Where an employer or its insurance carrier offers compensation to an injured employee, who refuses such offer, the employee must file his claim for compensation within a year after his injury or it will be barred under the provisions of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)), and the running of such time limit is not deferred until the continuing offer is withdrawn or the right to further payment controverted.

ARGUMENT

Point I.

The limitation prescribed in Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)) for the filing of compensation claims is mandatory and compliance therewith is jurisdictional.

Section 13(a) of said Compensation Act provides (33 U.S.C.A., Sec. 913(a)):

> "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred."

It is conceded in this case that the respondent, Pletz, was injured on November 12th, 1935, that he did not file his claim for compensation with the Deputy Commissioner until April 20th, 1937, and that he has never been paid any compensation (R. 3, 4, 17, 18, 31, 33, 43, 44, 251, 253).

Petitioners contend that by reason of respondent's delay in filing his claim for compensation, he lost such right. It is firmly established by the fed-

eral decisions, construing the section of the Longshoremen's Act under consideration, that the requirement that a claim for compensation be filed within one year after injury is mandatory and jurisdictional.

This question was treated exhaustively in the case of Young v. Hoage (App. D.C.) 90 F. (2d) 395. In that case the claim was not filed within one year after the employee's death. The court said (pages 397 and 400):

> "Section 13 * * * is mandatory, and gives no discretion to the commissioner, but provides in plain words that failure to file a claim within a year shall be an absolute bar to recovery —except where objection to such failure (under section 13(b)) is not made at the first hearing. *It is therefore jurisdictional.*
>
> * * * * *
>
> It is enough to say, we think, that the rule is established that, where a statute gives a right of the character in question—a right unknown to the common law—and limits the time within which an action shall be brought to assert it, the limitation defines and controls the right. William Danzer & Co. v. Gulf R. Co., 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126. In that view the objection made here is jurisdictional, and here there are no equities which we can properly consider."

Kobilkin v. Pillsbury (9th Cir) 103 F. (2d) 667 (affirmed by Supreme Court of the United States by an equally divided court, 309 U. S. 619, 60 S. Ct. 465, 84 L. Ed. 983).

Romaniuk v. Locke (D.C.N.Y.) 3 F. Supp. 529, 530.
Dawson v. Jahncke Drydock (D.C.La.) 33 F. Supp. 668, Syll. 7.
Liberty Mut. Ins. Co. v. Parker (D.C.Md.) 19 F. Supp. 686.
Morgan v. Harrison (App. D.C.) 91 F. (2d) 310, 312.

Point II.

If the claim of a workman for compensation is not filed within the period provided for by the Longshoremen's and Harbor Workers' Compensation Act it is lost, and pleas of waiver and estoppel are of no avail.

As said by Judge Mathews in the case of Hilty v. Fairbanks Exploration Co. (9th Cir.) 82 F. (2d) 77, 79, in referring to a similar provision in the Alaska Workmen's Compensation Act:

> "The limitation therein prescribed goes not merely to the remedy, but to the right of action created by the act. * * The requirement that action be commenced within two years is a limitation upon the right, not a mere limitation upon the remedy. This requirement is absolute and unconditional. If the action is not commenced within two years, there is no right of action, and pleas of ignorance, concealment, misrepresentation, and fraud are of no avail."

See, also: William Danzer Co. v. Gulf R. R. Company, 268 U. S. 633, 636; Rogulj v. Alaska Gastineau Mining Co. (9th Cir.) 288 F. 549, 551; Taylor v. American Employers' Ins. Co., 35 New Mexico 544, 3 P. (2d) 76, Syll. 1; Walsh v. A. Waldron &

Sons, 112 Conn. 579, 153 Atl. 298; Petraska v. National Acme Co., 95 Vermont 76, 80, 113 Atl. 536, 538; Rosell v. State Industrial Accident Comm., 164 Or. 173, 192, 95 P. (2d) 727, 734.

Point III.

Where an employer or its insurance carrier offers compensation to an injured employee, who refuses such offer, the employee must file his claim for compensation within a year after his injury or it will be barred under the provisions of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 913(a)), and the running of such time limit is not deferred until the continuing offer is withdrawn or the right to further payment controverted.

In the case at bar the employer's insurance carrier on numerous occasions during the year immediately following respondent's injury endeavored to induce him to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 141, 142, 161, 174, 192, 219, 221, 226). Respondent, who was in contact with his various lawyers (R. 138, 139, 144, 155, 156, 172, 201, 225, 227) steadfastly refused to accept compensation, either because he did not feel that the offer was high enough (R. 136, 144, 150) or because upon advise of his lawyers he thought he could break the said Compensation Act (R. 227, 228) or because he thought he had a third party claim (R. 170, 193)

or because he was insisting that a lump sum settlement be made (R. 152, 158, 170).

In the prevailing opinion of the Circuit Court of Appeals in the present case (R. 283), the court lays stress upon the fact that the petitioning insurance carrier had offered respondent compensation payments "until at least as late as the end of April, 1936, and perhaps much longer." The said court in its prevailing opinion then goes on to say (R. 283, 284):

> "The representative of the carrier in immediate charge of the case thought that the disability was probably terminated several months prior to September 1936, but the precise date of the supposed termination is not stated. No intimation of this belief was conveyed at the time either to the commissioner or to appellee. When asked why a controversial was not filed with the deputy commissioner because of the supposed recovery, this witness stated that there was no reason to file a controversial and that he did not understand that a report controverting the claim was due. The explanation of this attitude appears to lie in the fact that appellee was declining to accept the compensation tendered, asserting that his prior earnings entitled him to a larger weekly sum or that he would prefer a lump sum settlement. In short, the carrier appears to have assumed that under the circumstances it was entitled to defer controverting liability until a formal claim was filed; and it is to be gathered that the deputy commissioner was of the same opinion."

The Circuit Court in its opinion fails to mention the fact that respondent also refused to accept compensation because he was advised he could break the Compensation Act (R. 227, 228) and also because he was claiming that he had a third party action or a direct action against his employer (R. 170, 193), and that he informed Mr. Pickett he was not going to accept compensation (R. 170). Further, though he was given every opportunity to do so, he failed to offer any proof that the amount of compensation offered to him was less than he was entitled to (R. 136, 145, 150).

Assuming, however, that the representative of the insurance carrier did think that respondent's disability was probably terminated several months prior to September, 1936, how was the carrier to get rid of respondent's right to compensation during the time the carrier admitted he was disabled? Certainly the carrier could not have defeated respondent's right to compensation for such period by filing a controversial prior to the expiration of a year after his injury. Under the express provisions of Section 13(a) of the Compensation Act (33 U.S.C.A., Sec. 913(a)), respondent had a year after his injury within which to file his claim for compensation.

Even though the representative of the insurance carrier did feel that the respondent's disability was probably terminated in the summer of 1936, the fact that no controversial was filed during 1936

would not extend the time during which the respondent must file his claim for compensation with the Deputy Commissioner. If the respondent had filed his claim for compensation within the year period following his injury, then the fact that the insurance carrier had failed to file a controversial might be some evidence against a claim of the carrier that the disability of the respondent had previously terminated. However, the fact that the insurance carrier did not file a controversial claiming that respondent's disability had terminated did not preclude it from controverting respondent's claim upon the ground that it was not filed with the deputy commissioner within the year period provided by Section 13(a) of the Compensation Act (33 U.S.C.A., Sec. 913(a)). The only way in which the right to controvert the failure to file the claim within the statutory period could be waived under the Act was by failing to object to such failure at the first hearing before the Deputy Commissioner, Section 13(b) of the Compensation Act (33 U.S.C.A., Sec. 913(b)).

The question under consideration was passed upon by the Court of Appeals for the District of Columbia in the case of Fulton v. Hoage, 77 F. (2d) 110, 112. In that case the employer contended that the claim of the injured employee should be rejected because it was not filed within one year after the alleged injury of the employee, as required by Section 13(a) of the Compensation Act. On the other

hand, the employee contended that the employer was prevented from making the defense that the claim for compensation had not been filed in time by reason of the fact that the employer had not filed a notice of controversial, as required by Section 14(d) of the said Act (33 U.S.C.A., Sec. 914(d)). Chief Justice Martin in disposing of the question said (page 112):

> "It is contended by plaintiff's counsel that the failure to file such notice (of controversial) forecloses the defendants from making any defense against plaintiff's claim, and establishes the claim as a 'vested right' to compensation in the plaintiff. We cannot sustain this contention, for in our opinion the plaintiff nevertheless was bound to file her claim for compensation within a year after the date of her injury as required by section 13, supra."

In this connection, we also call the Court's attention to the case of Andress v. Art Metal Const. Co., 211 N. Y. Supp. 752, where the court had before it a statute similar to the one under consideration in this case. In the Andress Case, Syll. 1, it was held:

> "Failure of employer or insurance carrier desiring to contest death claim to file notice of controversy required by Workmen's Compensation Law, Sec. 25, as amended * * does not operate as a waiver of all right to contest claim except question of dependency, in view of sections * * 28 * *."

The court, in its opinion in the foregoing case, further said (page 754):

"The purpose of section 25, supra, in providing for filing of a notice of controversy, *was to expedite the trial of the cases*, but the remedy of the board is to require the filing of the notice or its equivalent, not to declare a forfeiture not fixed by the statute. * * So, too, in section 28 of the statute, it is provided that failure to file a claim within one year shall bar the right to claim compensation unless waived by failure to raise the objection on the hearing."

The Act before us contains provisions similar to those contained in the enactment under consideration in the foregoing case. Section 14 of the Longshoremen' Act (33 U.S.C.A., Sec. 914) requires the filing of a controversial in certain instances; Section (13(a) of said Act (33 U.S.C.A., Sec. 913(a)) requires that compensation claims be filed within one year after employee's injury, while Section 13(b) of the Act provides that failure to file a claim within the period prescribed shall not be a bar "unless objection is made to such failure at the first hearing" etc. (See page 279 of the record for pertinent portions of Sec. 13 of said Act and pages 285-287 of the record for pertinent portions of Sec. 14 of said Act). In the instant case, respondent's claim was controverted by the employer and the insurance carrier on the ground that it was not filed within the statutory time (R. 259-262). Also at the first hearing on respondent's alleged claim, a like objection was made thereto (R. 210). This is all that was required by the Act. Dawson v. Jahncke (D.C. La.) 33 F. Supp. 668-670).

In the prevailing opinion in the Circuit Court in the instant case, it was also said:

> "By a parity of reasoning where, as here, there is a continuing offer amounting to a tender of compensation based on a condition of total disability, the employee is entitled to assume that the carrier holds itself in readiness to pay the sum periodically offered; and that he may dispense with the filing of a claim so long as that situation persists. We think, therefore, that the time limit prescribed by 13(a) applies not only to cases where compensation is actually paid, but to situations where the statutory compensation is tendered; and that the time limit does not commence to run until the continuing offer is withdrawn or the right to further payment controverted. For the purpose of the limitation, tender must be held the equivalent of payment."

It should be borne in mind that Section 13(a) of the Compensation Act (33 U.S.C.A., Sec. 913(a)) provides that claims for compensation "shall be barred unless a claim therefor is filed within one year after the injury," except "if *payment* of compensation has been made without an award on account of such injury * * a claim may be filed within one year after the date of last payment." Therefore, the only way in which the time for filing a claim for compensation may be extended under the Act is by the *payment of compensation.*" In the present instance no such payment was made. The respondent refused to accept compensation at all times until after the expiration of the year following his injury for any one of four reasons, as we

have shown above.

Can it be said that because the insurance carrier in the present instance offered to pay the respondent compensation, which offer was rejected by respondent for reasons of his own, that such offer constituted "a payment of compensation" within the meaning of Section 13(a) of said Compensation Act (33 U.S.C.A., Sec. 913(a))?

What does the word "payment" mean? In Bronson v. Rodes, 74 U. S. 229, 250, 19 L. Ed. 141, 146, the court said that "Payment of money is delivery by the debtor to the creditor of the amount due." There was no delivery of any money in the present instance. Hence, there was no payment of compensation.

Also in Bailey v. Commissioner of Internal Revenue (C.C.A. 5) 103 F. (2d) 448, 449, the court said:

> "A payment does not occur unless 'the money passes from the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.' 21 R.C.L., Payment, Sec. 3."

In 42 C. J., Tender, page 656, the rule is thus stated:

> "The difference between payment and tender is broad and clear. Payment implies an acceptance and appropriation of that which is offered by one party to the other, whereas tender is the act of one party, in offering that which he admits to be due and owing, but which is not accepted by the creditor."

In Rogers v. Joplin & P. Ry. Co., 115 Kan. 815, 818, 225 P. 108, 110, the court said:

> "Did the statement of Fennimore, the defendant's assistant manager to plaintiff, 'that when plaintiff wanted any compensation or assistance 'to let him know,' amount to a waiver of demand for compensation? We think not."

Also in Klein v. McCullough, 135 Kan. 593, 596, 11 P. (2d) 983, 984, an injured employee failed to serve a written notice of claim on his employer within the time required by the Compensation Act of Kansas. The court said:

> "There was testimony that while the claimant was in the hospital his employer called on him and they talked about compensation:
> 'Q. Did you ask him for compensation? A. I asked him if there was any compensation on that and he said 'Yes.'"

The court in the foregoing case held that the claim of the employee was barred because he had failed to comply "with the statutory prerequisite of a timely written demand for compensation."

In this connection, we feel that the statement of Judge Haney of the Circuit Court in his dissenting opinion is the only logical construction to place upon the statute under consideration. Judge Haney said (R. 288):

> "The effect of the majority opinion is to amend the statute so that the one-year period runs from the date of the 'last tender' rather than from the date of the 'injury' as is specified in the statute. The result of such amend-

ment is to open, for each claimant, a way to indefinitely suspend the statute by merely failing to accept a tender. Such construction does not contribute to 'prompt' disposition of the matter, an aim said in the majority opinion to be desired.

The majority further says: 'For the purpose of the limitation, tender must be held the equivalent of payment.' How there can be payment of a claim, the amount of which is not yet determined, is not clear."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the questions here involved may be permanently settled by this Honorable Court and a proper construction and interpretation made, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the said United States Circuit Court of Appeals for the Ninth Circuit, and finally reverse it.

Respectfully submitted,

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